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Nos. 3 and 4

In the Supreme Court of the United States

OCTOBER TERM, 1957

JOSEPH DANIEL CARLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CHARLES MACK LAWRENCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

[redacted]

[redacted]

[redacted]
Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 3

JUNIUS IRVING SCALES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 4

CLAUDE MACK LIGHTFOOT, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES ON REARGUMENT

A. Each of these cases involves, *inter alia,* substantially the same production-of-documents issue which was raised and decided in *Jencks* v. *United States,* 353 U.S. 657. See Brief for the United States in *Scales,* No. 29, Oct. Term, 1956, pp. 74-77; Brief for the United States in *Lightfoot,* No. 32, Oct. Term, 1956, pp. 38-40. Each case, accordingly, must be reversed for further proceedings in the light of the *Jencks* decision. On the retrial, if the same witnesses

are called by the Government and demand is made for production of their written statements to the F.B.I., the procedure will presumably be that directed by new Section 3500 of Title 18 of the United States Code, as added by Public Law 85-269, 85th Cong., 1st Sess., approved on September 2, 1957.

B. We assume that the Court, in nevertheless restoring the cases to the docket for reargument (the order directing reargument was entered on the same day, June 3, 1957, on which *Jencks* was decided, 353 U.S. 979), desires to hear reargument of the constitutional and other issues involved in these cases, particularly the validity of the Smith Act's membership clause on its face and as applied. Should the Court sustain the validity and application of this clause, reversal would presumably be limited to the production-of-documents issue. Should the Court, on the other hand, hold that the membership clause is invalid or inoperative, either on its face or as applied, or that there is insufficient evidence to warrant a retrial (cf. *Yates* v. *United States*, 354 U.S. 298, 327-334), the result would be either (1) that the cases will have to be dismissed, or (2) that new trials will be required under the Court's directions with respect to the admission of evidence or for the giving of different instructions to the jury (in addition to compliance on the production-of-documents issue)—depending upon the precise scope and nature of the rulings.

The purpose of this supplemental memorandum is (1) to clarify some aspects of our argument at the last term on the constitutional issue, and (2) without in any wise abandoning our position that the membership clause has been properly and validly applied in

these cases, to present certain suggestions as to the disposition of the cases should that position not be wholly accepted by the Court. On the other issues in the two cases—evidential, statutory, and procedural—we rest on the discussion in the briefs on the original arguments.

1. In defending the validity of the membership clause on its face, and as applied here, in our briefs on the original arguments (*Scales*, pp. 23-26, 33-48, adopted by reference in *Lightfoot*, at p. 35), we urged that that clause, properly construed, does not apply to "a merely passive status", but solely to "*active* membership" (see our *Scales* brief at pp. 41, 43-44, 45, 47, emphasis added) in a society, group, or assembly of the type defined by the Act, with the requisite knowledge and intent. Since neither jury in these cases was specifically instructed that a finding of such *active* membership was requisite to conviction,[1] there was implicit in our argument the idea that the determination that the membership be of an active quality was not required to be made by the jury, but could be made by the court—in the same manner that a finding of the existence of a "clear and present danger" is one which is properly made by the court rather than by the jury (*Dennis* v. *United States*, 341 U.S. 494, 511-515).

We emphasize that we do *not* suggest that the factor of "activity" is to be considered an element of the crime established by the Smith Act, to be proved in

[1] The juries were instructed, in substance, that the essential elements of the offense were (1) membership in a society, group, or assembly which advocates the violent overthrow of the Government, together with (2) knowledge that the group so advocates and (3) the personal intent to bring about such overthrow as speedily as circumstances would permit.

addition to (a) membership, (b) knowledge of the group's unlawful objective, and (c) personal intent to bring about that objective. This factor of "activity" is not at all a constituent element of the offense but, rather, an independent and controlling constitutional standard by which to test whether the membership clause of the Smith Act has been validly applied in a particular case. Statutorily, the crime is fully proved by sufficient evidence of membership, knowledge, and intent, but the "activity" test then determines whether the conviction can be allowed to stand under the Constitution. Just as the finding of "clear and present danger" is not an integral element of the various offenses under the Smith Act, but an external constitutional limitation on the validity of convictions under the Act which are otherwise proper, so, in our view, the factor of "activity" plays the same limiting role with respect to the membership clause.

For this reason—that the "activity" factor is not an element of the offense but an overriding constitutional test—we think it plain that the determination of "activity" is not for the jury but for the court—on the basis of its own evaluation of all the evidence adduced by both sides. With respect to this determination, as well as for the "clear and present danger" finding, "[t]he question * * * is whether the statute which the legislature has enacted may be constitutionally applied. In other words, the Court must examine judicially the application of the statute to the particular situation, to ascertain if the Constitution prohibits the conviction. * * * Bearing, as it does, the marks of a 'question of law,' the issue is properly one for the

judge to decide" (*Dennis* v. *United States*, 341 U.S. at 514-515).[2]

In these two cases, this test of "activity" is fully met, as shown by the Statements in our original briefs and in the summaries of the evidence there set forth (*Scales*, pp. 10-23, 59-64; *Lightfoot*, pp. 4-20, 29-34). It is indisputable that each petitioner was a significant Party leader, devoting a considerable portion of his time and efforts to the activities, and furthering the cause, of the Communist Party. We submit that the Court should have no difficulty whatever in determining, on these records, that the constitutional test of "activity" is satisfied in both cases.[3]

2. If, however, the Court, while accepting our position that only *active* membership can be made punishable by the Act, should be of the view that the determination of whether the membership is or is not of an active quality is for the jury to decide—if, in other words, the Court should rule that this issue is an integral element of the crime which must, like other such elements, be submitted to the jury—it is evident that new trials would be required at which this issue could be presented to the juries under proper instructions.

Should the Court hold that this is required, it would be desirable, we suggest, to give guidance to the trial courts as to the contents of a proper instruction. As we have indicated, it is one of the purposes

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[2] If we are right, the determination can be made by this Court in the first instance. Cf. *Dennis* v. *United States*, 341 U.S. at 510-511.

[3] The appropriate standard for the Court to apply would be the same as that suggested *infra*, pp. 6-7, for an instruction to the jury on "active" membership, if such a charge should be held to be required.

of this memorandum to set forth what we consider an appropriate instruction on this subject should the Court hold such a charge to be required. It is submitted, accordingly, that an instruction phrased in substance as follows would be appropriate:

> You are further instructed, however, that it is not every membership in a society, group, or assembly of the kind I have described to you which this statute prohibits. The membership must be something more than a merely nominal, passive, inactive, or purely technical membership in order for you to bring in a verdict of guilty, and this is true irrespective of whether the member may have had knowledge of the nature and purposes of the society, group, or assembly in question, and even if he may have fully intended to bring about the forcible overthrow of the Government as soon as circumstances permit. I charge you that it is only active membership which is forbidden by this statute. Only if you find that the defendant was, during some or all of the period in question, an active member of an organization or group of the type I have described may you convict him, and even then only if the other requisites which I have mentioned, namely, knowledge and intent of the sort I have described, are also found by you to have been present.
>
> In determining whether the defendant was an active member in the sense I have referred to, the test which you should apply is this: Did he devote all or a substantial part of his time and efforts towards carrying on the work of the organization to which he belonged and furthering its ends?

If so, he was an active member, and you should return a verdict of guilty provided all the other elements which I have mentioned to you were also present. If not—if he devoted only a negligible amount of his time and efforts in that manner, or none at all—then he was not an active member, and you must return a verdict of not guilty regardless of what else you may find.

We believe that an instruction phrased in substantially the above language—assuming that any such instruction is necessary—would fully obviate petitioners' objection to the membership clause of the Smith Act on the ground that it applies indiscriminately to the merely passive member as well as to the active one.[4]

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

SEPTEMBER 1957.

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[4] In these two cases, there is no difficulty with the element of "membership" since both petitioners have admitted membership in